



City Research Online

City, University of London Institutional Repository

Citation: Stones, R. (2021). Why Should Competition Lawyers Care About the Formal Rule of Law?. *Modern Law Review*, 84(3), pp. 608-635. doi: 10.1002/ijfe.2446

This is the published version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: <https://openaccess.city.ac.uk/id/eprint/25406/>

Link to published version: <https://doi.org/10.1002/ijfe.2446>

Copyright: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

Reuse: Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

REVIEW ARTICLE

Why Should Competition Lawyers Care about the
Formal Rule of Law?

Ryan Stones*

Bruce Wardhaugh, Competition, Effects and Predictability: Rule of Law and the Economic Approach to Competition, Oxford: Hart, 2020, 272 pp, hb £70.00

Competition law scholarship tends to be preoccupied with questions of substance. ‘More’ or ‘less’ intervention? Contentment or concern with concentrated markets? Which business practices should be prohibited? These are key issues with significant consequences for enforcement. But the substantive reach of competition law – the ‘what’ we prohibit – cannot be divorced from questions of the legal *form* of market intervention – ‘how’ we determine legality. At what likelihood of harm do we adopt a presumption of illegality for a practice? When an anticompetitive impact is more likely than not? Solely when convinced that it is harmful in every circumstance, for fear of condemning efficient conduct? Alternatively, if we can only be sure that a practice is anticompetitive following individualised, context-specific analysis of its economic consequences, should commercial uncertainty, the risk of errors, and scarce resources suggest that it isn’t worth the hassle?

Competition, Effects and Predictability by Bruce Wardhaugh is notable for directly addressing questions of legal form in competition enforcement. Its novelty derives from a strong emphasis upon the formal rule of law. To those unfamiliar with European competition scholarship, such ‘novelty’ – and indeed responses to the title of this article – may seem banal. But that really isn’t the case.

Scholarly appreciation for realising the formal rule of law in EU competition enforcement has been marginal since the 1960s, owing to a near consensus that effects-based, *ad hoc* determinations of legality constitute the economically optimal form of market intervention. In 1967 René Joliet criticised the fledgling European regime for adopting generalised presumptions, bluntly delineating the

*Lecturer in Law at City, University of London.

boundary between legality and illegality.¹ Sophisticated enforcement required ‘a thorough factual analysis, on a case-by-case basis, in the light of economic investigation’, thereby accurately prohibiting the ‘bad’ and permitting the ‘good’.² This set the tone for decades. Some question the need for competition law to be predictable.³ Others have advocated determining the legality of business conduct through context-specific economic analysis of its competitive effect,⁴ thereby undermining aspirations towards a system of clear and generalised obligations.⁵ This has been especially pronounced in scholarship critical of EU law on abuses of market dominance.⁶ Other imperfect generalisations intended to foster legal certainty – block exemption regulations,⁷ indicative enforcement guidelines⁸ – have also been dismissed as formalistic ‘pigeon-holing’,⁹ ignoring the actual economic consequences of the conduct in question.

Resistance to this consensus on the appropriate form of competition law is difficult to pinpoint in European scholarship before the mid-2000s.¹⁰ But in the last 15 years this has started to change. Several scholars have challenged the notion that realising generalised, predictable norms, and economically sophisticated enforcement are mutually exclusive. Sometimes labelled a ‘Neo’-Chicago approach, they advocate the incorporation of economic learning into the design of presumptions and structured tests, thereby aiming to reconcile accurate economic outcomes with approximating the formal rule of law.¹¹

Competition, Effects and Predictability contributes to this debate. Wardhaugh’s overall argument is that an ‘effects-based approach’ to determining legality ‘is a threat to the rule of law’ (2). Following an account of how both competition law in the US (Chapter 2) and EU (Chapter 3) have increasingly favoured this means for determining legality, Wardhaugh ultimately adopts a solution akin to the ‘Neo’-Chicagoans of incorporating economic learning into the *ex ante*

1 R. Joliet, *The Rule of Reason in Antitrust Law: American, German and Common Market Laws in Comparative Perspective* (Liège: Faculté de Droit de l’Université de Liège, 1967) 117.

2 *ibid.*, 190.

3 For example I. Forrester, ‘The Modernisation of EC Antitrust Policy: Compatibility, Efficiency, Legal Security’ in C. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2000: The Modernisation of EC Antitrust Policy* (Oxford: Hart, 2001) 102–103.

4 For example V. Korah, ‘EEC Competition Policy – Legal Form or Economic Efficiency’ (1986) 39 CLP 85, 92–93.

5 The exception is the presumptive illegality of cartels.

6 For example Economic Advisory Group on Competition Policy, ‘An Economic Approach to Article 82’ 2–6 at http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf (last visited 3 December 2020).

7 For example S. Bishop, ‘Modernisation of the Rules Implementing Article 81 and 82’ in Ehlermann and Atanasiu, n 3 above, 56.

8 For example P. Akman, ‘Consumer Welfare’ and Article 82EC: Practice and Rhetoric’ (2009) 32 *World Competition* 71, 78.

9 See D. Hay, ‘Pigeonholes in Antitrust’ (1984) 29 *Antitrust Bulletin* 133.

10 For example R. Whish and B. Sufrin, ‘Article 85 and the Rule of Reason’ (1987) 7 YEL 1, 37.

11 For example D. Evans and J. Padilla, ‘Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach’ (2005) 72 U Chicago LR 73; A. Christiansen and W. Kerber, ‘Competition Policy with Optimally Differentiated Rules Instead of “Per Se Rules Vs Rule of Reason”’ (2006) 2 JCLE 215; Y. Katsoulacos and D. Ulph, ‘On Optimal Legal Standards for Competition Policy: A General Welfare-Based Analysis’ (2009) 57 *Journal of Industrial Economics* 410.

design of presumptions and structured tests (11–12, 211–212, 222).¹² In this way, competition enforcement can be economically informed *and* foster legal certainty for businesses.

Competition, Effects and Predictability has much promise as the first monograph-length analysis of the formal rule of law in competition law. The significance of the ideal tends to be underdeveloped in this field, limiting its conceptual clout in contemporary debates on the form of market intervention. Wardhaugh had the opportunity to offer a clarion call for fellow advocates of the formal rule of law in competition enforcement, providing a persuasive articulation of why it matters, anchoring other scholarship critical of the formal consensus. It could also have caused those advocating case-by-case, effects-based determinations of legality to directly address the consequences of their preferred form of market intervention.

Competition, Effects and Predictability fails to realise this potential. Unfortunately, it does so in a way that is arguably more damaging for those of us who sympathise with Wardhaugh's aim of re-emphasising the rule of law in competition circles. The problem is that the argument of the book falls at the first hurdle: *Competition, Effects and Predictability* doesn't offer a compelling account of why any reader, ally or adversary, should care about the formal rule of law in competition enforcement. Wardhaugh's account of 'The Rule of Law and Why it Matters' (Chapter 1) is so underwhelming that it is incapable of sustaining analysis of the ideal's alleged demise for the rest of the book. After hinting that the origins of the concept lie in attempts to constrain centralised power (16–17), such justificatory beginnings are quickly abandoned as 'not our task' (17). Wardhaugh is correct that ethereal jurisprudential discussions of the rule of law are easily dismissed as a lawyerly fetish in a field animated by economic goals in real-world markets (14). But that does not mean that one must choose political *or* economic justifications for the formal rule of law in competition enforcement.

In any event, Wardhaugh advances neither for around 20 pages. The reader is instead offered a basic account of the formal conceptualisation of the rule of law through a listing of desiderata proposed by Lon Fuller and Joseph Raz (18–19). Occasional references are made to predictability, guiding legal subjects, and avoiding arbitrary decision-making (18–21), but no sustained attempt is made to convince the reader of their importance. If anything, Wardhaugh's lukewarm allusions to any 'pros' makes his explicit consideration of the 'cons' hit even harder: the ideal upon which he grounds *Competition, Effects and Predictability* is compatible with 'even the most abhorrent regimes' (21) and coheres with 'laws that are bad or wrong or even evil in content' (22). Although Wardhaugh ultimately accepts that substantive interpretations are too broad (24–27), the damage to the formal account has already been done.

His next step is to demonstrate that the formal rule of law is valued by the USA and EU legal orders, occasionally being mentioned in judicial decisions (27–35). Again, a justification for why it *should be* considered important in competition law is absent; this is unfortunate given reference to the is/ought fallacy immediately beforehand (26).

¹² However unlike 'Neo'-Chicagoans, Wardhaugh advocates including non-economic goals when designing legal tests (212).

The final substantive section of the chapter is titled 'Why the Rule of Law Matters'. Although reiterating that convincing competition commentators will require a robust economic justification, Wardhaugh instead offers a paragraph on New Institutional Economics (36), recognition that 'the rule of law' is a World Bank development indicator (37–38), acknowledgement that international investment treaties attempt to stabilise the regulatory environment (38–39), and brief reflections on uncertainty as a transaction cost (40).

Is that all there is? Is that what commentators in competition circles are defending or disregarding? A concept of murky liberal origins, purely concerned with legal certainty but without clear justification, compatible with evil but occasionally mentioned by judges, and included within investment relations and pseudo-scientific development indicators? No wonder concern for the formal rule of law has been drowned out by a push towards effects-based analysis; even those sympathetic to Wardhaugh's argument will finish the chapter wondering whether the formal rule of law ideal is worth fighting for in competition law.

The main purpose of this piece is to achieve what Wardhaugh does not: to argue why competition lawyers should care about the formal rule of law. To effectively scrutinise individualised, effects-based determinations of legality and to advocate a more balanced reconciliation of accurate outcomes with realising the formal rule of law, a compelling articulation of what is at stake is necessary. In failing to explain its value within this specific context of economically animated market interventions, concerns about the appropriate form of competition law can easily be dismissed as stereotypical lawyerly qualms. This article will articulate the political and economic significance of the formal rule of law in competition policy.

This is not to say that with stronger foundations *Competition, Effects and Predictability* would be free from problems. Having built his theory around the importance of legal certainty, Wardhaugh's subsequent embrace of behavioural economics may be difficult to reconcile with the assumption of rationality underpinning the formal rule of law. Furthermore, the exclusive focus upon predictability is too narrow: the equal application of generalised laws is almost entirely absent from consideration; and Wardhaugh's criticism of courts misses their importance for dynamically approximating the formal rule of law, thereby making the ideal more achievable. For the formal rule of law to be taken seriously in competition scholarship, it is critical that such inconsistencies and omissions are avoided.

DEFINING THE FORMAL RULE OF LAW

The rule of law is an aspirational ideal that goes beyond the mere requirement of legal validity. For instance, a legitimately enacted law may create secret obligations or confer discretionary power for a decision-maker to act as they 'see fit'. While technically 'legal', many would argue that such situations are contrary to the rule of law, which represents a valuable 'extra' beyond bare legality.

Difficulties arise when deciding what this 'extra' should entail. The rule of law has maintained its position as a key idea of Western legal philosophy for

centuries owing to its malleability.¹³ This necessitates precision as to the conceptualisation adopted from an extensive back catalogue.

Wardhaugh adopts a 'formal' understanding to critique US and EU competition enforcement (16–27). As the title of the book suggests, his principal focus is the predictability of legal obligations for businesses. While a sound starting point, normative certainty is not enough. First, Wardhaugh never grapples with a common motif of the formal conceptualisations upon which he draws: the *generality* of laws. Second, although Wardhaugh inconclusively flirts with the suggestion (22–24), legal certainty is an unrealistic and static ideal without an *institutional mechanism* for reviewing decision-making, resolving disputes, and dynamically readjusting the law in response to change.

The conceptualisation of the formal rule of law argued here to be important for competition enforcement comprises three principles:

- (1) Comprehensible laws, capable of internalisation by subjects.
- (2) Generalised laws of equal application.
- (3) Judicial review and adjudication.

At the outset, it is important to stress the aspirational nature of the first two principles. To realise the formal rule of law ideal is to progress along a sliding scale of legal forms, from 'less' to 'more' comprehensible and generalised. It is their impossibility that highlights the instrumental importance of the third as a mechanism for gradually refining the legal order towards the ideal.

Like Wardhaugh, the following account of the rule of law derives from the similar conceptualisations offered by Fuller¹⁴ and Raz,¹⁵ as well as critics.¹⁶ It also draws from Hayek's writing.¹⁷ Wardhaugh's reluctance to engage with Hayek is a mistake.¹⁸ Hayek interacted and affiliated with the Ordoliberals and the Chicago School of antitrust, both of whom occupy prominent positions within the intellectual history of the field. Furthermore, Hayek synthesised theorising on the rule of law with considerations of economic order. These aspects make his writing especially relevant when evaluating the desirable form for market interventions in pursuit of the economic goals of competition policy.

Like Wardhaugh's (initial) approach (24–27), this conceptualisation of the rule of law is not substantive.¹⁹ It casts no judgement on the content of law and the ends pursued; it could be 'good' or 'bad', economically informed or illiterate.

13 For an overview: B. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: CUP, 2004).

14 L. Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, rev ed, 1969) 33–39.

15 J. Raz, 'The Rule of Law and its Virtue' in *The Authority of Law: Essays on Law and Morality* (1979, Oxford: Clarendon Press, 2011) 214–218.

16 R. Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (New York, NY: Free Press, 1977) 52–54, 176–177; P. Nonet and P. Selznick, *Law & Society in Transition: Toward Responsive Law* (1978, New Brunswick: Transaction Publishers, 2001) 53–54.

17 F. Hayek, *The Road to Serfdom* (1944, London: Routledge, 2001) (*Serfdom*) 75–76; *Law, Legislation and Liberty* (1973/1976/1979, London: Routledge, 2013) (*LLL*) 116.

18 Save for a reference to Hayek and Raz advancing similar accounts (18).

19 R. Summers, 'A Formal Theory of the Rule of Law' (1993) 6 *Ratio Juris* 127, 135–138; P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] PL 467, 477–487.

It is also silent on the democratic credentials of laws.²⁰ But these limitations are not fatal. The pragmatic defence of a thin conceptualisation is that advocates of wider definitions of the rule of law commonly accept the desirability of these formal characteristics anyway.²¹ The defence from principle is that rather than a failing, deliberate minimalism isolates the desirable consequences of the purely formal and institutional desiderata, without their being lost in broader visions of political theory and constitutional design.²² While acknowledging the substantive critique (21–22, 24–25), Wardhaugh ultimately accepts these counterclaims to justify focusing upon the formal rule of law (26–27), albeit inconsistently.²³

The significance of each element of the formal rule of law ideal will be advanced in turn.

COMPREHENSIBLE LAWS

Principle 1 – *Comprehensible laws, capable of internalisation by subjects*: the ability to comprehend legal obligations and determine actions in response. This capacity for ‘internalisation’ or ‘comprehensibility’ is a catch-all for the variety of formal characteristics frequently posited: clarity, publicity, prospectivity, consistency, possibility, etc. Its antithesis is the promulgation of incomprehensible laws that cannot be internalised by subjects resulting from, for example, their secrecy, ambiguity, inconsistency, or requiring the impossible.

Wardhaugh’s (initial) vision of the formal rule of law is essentially that competition law ought to be clear to legal subjects (18–19), recounting Fuller’s famous principles (publicity, prospectivity, clarity, etc).²⁴ But why should competition lawyers care? It will be argued that throughout centuries of liberal political theory, approximating this ideal respects the rationality of legal subjects. Clearly delineating rights and obligations amplifies the meaningful exercise of individual freedom. In reflecting this rationality, it also facilitates the attribution of responsibility for illegality. New Institutional Economics similarly illustrates that market actors rely upon informational cues provided by institutions, including laws. Comprehensible norms are institutions that economic operators can rely upon to undertake efficient market decisions.

Political significance

Wardhaugh offers two paragraphs situating the rule of law within liberal efforts to control state power, decides there is no need to consider this further, and continues with oblique allusions to liberty, rationality, and avoiding arbitrariness

20 cf J. Habermas, *Between Facts and Norms* (Cambridge: Polity Press, W. Rehg trans, 1996) 102–103.

21 For example R. Dworkin, *A Matter of Principle* (Oxford: OUP, 1985) 13; Habermas, *ibid*, 82–83, 143–144, 153–154.

22 Raz, n 15 above, 211.

23 Chapter 5 argues that judicial changes to law are antidemocratic, ‘which has significant implications for the rule of law’ (153, 161–164, 171–172, 220).

24 Fuller, n 14 above, 33–39.

(16–18). But to persuasively convey the political significance of comprehensible laws in competition enforcement, it really *is* necessary to dive into political liberalism. Without such anchoring, references to certainty seem trite and are vulnerable to marginalisation.

Understanding the political significance of the formal rule of law requires recognition of the inescapable tension between two foundational principles of political liberalism, which is responsible for its manifold interpretations. The first is the importance of individual liberty (freedom, autonomy), the ability to pursue one's wishes without impediment.²⁵ The second is the requirement for centralised coercion, which derives its importance from the first: as everybody's liberty represents a threat to the freedom of others, the state must guarantee zones of mutual autonomy and resolve disagreements. This is freedom through law: the creation of rights and obligations that act as boundaries between individuals, as well as mechanisms for adjudication and enforcement.²⁶ Friction comes from recognition that centralised power is both a guarantor of and threat to liberty.²⁷ Acceptance of coercion to ensure mutual freedom therefore cannot be *carte blanche* for absolute authority. For centuries, liberals have offered alternative reconciliations between individual freedom and restrained governance. A recurrent solution is a constitution that *substantively* delineates the powers conferred centrally and individual rights,²⁸ often accompanied by the institutional separation of legislative, executive, and judicial functions to dilute power.²⁹ Without competence conferral and protected rights, freedom is enjoyed only so long as the state and/or the majority wills it.³⁰

The formal rule of law offers additional tools for addressing the tension between liberty and centralised power at the heart of liberalism. It is not just the mere *presence* of 'Guards and fences' vis-à-vis other citizens and government that facilitates freedom to pursue one's ends,³¹ but the *formal comprehensibility* of such boundaries. This connection between legal certainty and freedom was present at the birth of political liberalism. John Locke idealised the laws apportioning spheres of autonomy as offering a 'standing Rule to live by' rather than 'inconstant, uncertain, unknown' acts.³² He went so far as to argue that the legal

25 For example I. Kant, 'The Metaphysics of Morals' in M. Gregor (ed), *Immanuel Kant: Practical Philosophy* (1797, Cambridge: CUP, 1996) 220; Hayek, *LLL* n 17 above, 55.

26 For example J. Locke, *Second Treatise of Government and a Letter Concerning Toleration* (1690, Oxford: OUP, 2016) [S7], [S57], [S87]–[S88], [S124]–[S126], [S136], [S222]; Kant, *ibid*, 450–460; Hayek, *Serfdom* n 17 above, 60–62, 86; F. Hayek, *The Constitution of Liberty* (1960, London: Routledge, 2006) (*Constitution*) 13, 19–20, 122–123; Hayek, *LLL* n 17 above, 102, 201–204, 496; B. Leoni, *Freedom and the Law* (Princeton, NJ: Van Nostrand, 1961) 2–3.

27 For example Locke, *ibid*, [S93], [S137]; Hayek, *LLL* *ibid*, 462; R. Epstein, *Skepticism and Freedom: A Modern Case for Classical Liberalism* (Chicago, IL: University of Chicago Press, 2003) 57.

28 For example Hayek, *Constitution* n 26 above, 92; Hayek, *LLL* *ibid*, 2; R. Epstein, *Design for Liberty: Private Property, Public Administration, and the Rule of Law* (Cambridge, MA: Harvard University Press, 2011) 64.

29 Montesquieu, 'The Spirit of the Laws' in *The Complete Works of M de Montesquieu Volume I* (1748, London: T Evans, 1777) 198–199. Similarly: Locke, n 26 above, [S124]–[S126]; Hayek, *LLL* *ibid*, 2; Epstein, *ibid*, 27.

30 Hayek, *Serfdom* n 17 above, 74; Hayek, *Constitution* n 26 above, 90–93; Hayek, *LLL* *ibid*, 1, 346–347; Leoni, n 26 above, 7.

31 Locke, n 26 above, [S222].

32 *ibid*, [S22].

sovereign ought to be *bound* to act through the form of 'establish'd, standing Laws, promulgated and known to the People'.³³ Legal certainty facilitated the meaningful exercise of liberty as actions could be guided by known obligations, 'safe and secure within the limits of the Law'.³⁴

The link between legal comprehensibility and liberty is central to two prominent twentieth-century accounts of the formal rule of law. Repackaged as honouring rational autonomy to plan one's affairs, both Raz and Hayek situate the ability to internalise rights and obligations at the core of their definitions of the rule of law.³⁵ To construct paths for action in pursuit of their ends, citizens have to be able 'to foresee some of the conditions of [their] environments'.³⁶ Realising the ideal of comprehensible laws aims to provide the clearest articulation of rights and obligations for 'maximal certainty of expectations'.³⁷ This is not just important for interactions between private actors,³⁸ where 'good fences make good neighbours', but also vertical relations with centralised authority. By formally avoiding retroactive or vague laws, unforeseeable exercises of power are minimised.³⁹ Prospectively delineating the boundary between legal and illegal permits rational subjects to avoid transgressions and know that their plans won't be unexpectedly thwarted.⁴⁰ Clear laws foster expectations that can be relied upon.⁴¹ In contrast, incomprehensible laws and unforeseeable coercion render freedom indeterminate, chilling decision-making through fear of unknowing illegality.⁴² This is why liberals sometimes prefer a predictably 'bad' norm to no indication of rights and obligations at all.⁴³

Respect for rationality through aspiring towards legal certainty also relates to the relationship between free choices and the attribution of responsibility. Acknowledging rationality makes it possible to 'assign both credit and blame to individuals for their own actions'.⁴⁴ Individuals ought not to be penalised for conduct that they could not foresee as prohibited and with which they could not choose to comply.⁴⁵ This raises difficulties for judicially formulated laws which result from contestation as to the scope of illegality, for example jurisprudence on Articles 101 and 102 TFEU which constitutes the main source of EU competition law. The same is true of administrative decision-making which pushes the boundaries of pre-existing obligations. How is *ex post* determination of legality to be reconciled with absolution for unknowable violations of the law? If the importance of normative comprehensibility is recognised and

33 *ibid.*, [S131].

34 *ibid.*, [S137].

35 Raz, n 15 above, 214; Hayek, *Serfdom* n 17 above, 75–76.

36 Hayek, *Constitution* n 26 above, 118. Similarly, Habermas, n 20 above, 143–144, 201.

37 Hayek, *LLL* n 17 above, 103.

38 *ibid.*, 102.

39 Raz, n 15 above, 219, 224.

40 Hayek, *Serfdom* n 17 above, 76, 79; Hayek, *Constitution* n 26 above, 137.

41 Raz, n 15 above, 220–222; J. Waldron, 'The Rule of Law in Contemporary Liberal Theory' (1989) 2 *Ratio Juris* 79, 84, 88.

42 J. Rawls, *A Theory of Justice: Revised Edition* (Cambridge, MA: Harvard University Press, 1999) 208, 210.

43 Tamanaha, n 13 above, 67.

44 Epstein, n 27 above, 140.

45 Hayek, *Constitution* n 26 above, 181; Rawls, n 42 above, 209, 212.

the connection between rationality and responsibility acknowledged, previously unforeseeable illegality ought to result in no punishment.⁴⁶

To summarise, the political virtue of aspiring to laws that are comprehensible to subjects is that it permits them to meaningfully exercise their rational autonomy and freedom to plan their affairs. It also facilitates the attribution of responsibility. One might respond that this is fine, but that we are concerned with *competition policy; market interventions* in pursuit of *economic* goals. We can however reach similar conclusions on the significance of legal certainty via economic means.

Economic significance

Wardhaugh rightly notes that for the formal rule of law to be given appropriate attention in competition scholarship, its economic significance needs to be emphasised (14). But highlighting international development indicators and stabilisation clauses in investment treaties (37–39) is insufficient. Intuition indicates that more stable environments facilitate market activity, but how can we persuasively convey this to competition lawyers? As *Competition, Effects and Predictability* succinctly suggests (36), one option is to turn to New Institutional Economics (NIE).

Neo-classical microeconomic theory offers a toolbox for exploring the foundational concepts underpinning competition enforcement. Its analytical value derives from a methodology of deliberate abstraction and assumption, isolating a few moving parts to understand how stylised markets may or may not produce societally beneficial results. Without diminishing the value of this endeavour, real-world markets operate within a framework of institutions – laws, customs, money – that exogenously impact the working of the economic order. This was not lost on Carl Menger,⁴⁷ high priest of nineteenth-century neo-classicism, nor Adam Smith, who suggested that differing economic performance may relate to a country's 'laws and institutions'.⁴⁸

How institutions affect markets is the focus of NIE. Although its genealogy involves multiple strands,⁴⁹ two elements are of note. The first is Hayek's later writing on the free economic order, '*catallaxy*',⁵⁰ which operated spontaneously through a decentralised process of mutual adjustment by market actors with little individual knowledge in response to price signals.⁵¹ Rather than an equilibrium end-state with guaranteed benefits, Hayek's epistemological distaste for constructivist rationalism⁵² led him to conceptualise competition as

46 cf M. Eben, 'Fining Google: A Missed Opportunity for Legal Certainty?' (2018) 14 ECJ 129.

47 A. Schotter, *The Economic Theory of Social Institutions* (Cambridge: CUP, 1981) 3–5; V. Vanberg, *Rules and Choice in Economics* (London: Routledge, 1994) 145.

48 A. Smith, *The Wealth of Nations Books I–III* (1776, London: Penguin, 1999) 197–198.

49 Other sub-disciplines include property rights economics, public choice theory, and constitutional economics, the latter two of which are discussed later.

50 Hayek, *LLL* n 17 above, 269.

51 *ibid*, 14–15, 275–277.

52 *ibid*, 10–11, 28, 35–37.

an experimental discovery procedure.⁵³ Our ‘necessary and irremediable ignorance’⁵⁴ was clearest in the economy,⁵⁵ justifying faith in the decentralised market order to coordinate disparate pieces of information.⁵⁶ The laws surrounding market transactions influenced such spontaneous ordering. As curators of the legal framework within which economic forces occur, the legislature and courts ensured the automatic market mechanism ‘is kept in working order’.⁵⁷ The second formative impetus for NIE was transaction cost economics.⁵⁸ Building on foundations laid by Ronald Coase,⁵⁹ Oliver Williamson investigated how market concentration, opportunism, and uncertainty influenced contractual governance mechanisms between businesses and whether to internalise processes.⁶⁰ When the importance of transaction costs is emphasised, the efficient operation of market forces becomes dependent upon the institutional context within which economic activity occurs;⁶¹ it cannot be assumed that law is a benefit rather than a cost in business decision-making.⁶²

NIE can be reduced to several tenets on the relationship between markets and law.⁶³ The starting position is that neo-classical price theory abstracts away from the impact of uncertainty on decision-making and how institutions arise in response.⁶⁴ The efficient operation of the price mechanism is hindered by a lack of complete information on future conditions and the behaviour of others.⁶⁵ Institutions develop to provide predictable regularity;⁶⁶ ‘rules of the game’ within which economic processes take place.⁶⁷ Whether emerging organically (for example conventions) or deliberately (for example legislation),⁶⁸ they offer stability by limiting the range of permissible options open to market actors – prohibiting certain practices, delineating rights and obligations – which renders decision-making simpler and the conduct of others more foreseeable.⁶⁹ Business decisions need not consider every eventuality.⁷⁰ Institutions thus make

53 *ibid*, 407.

54 *ibid*, 13–14.

55 *ibid*, 496–497.

56 *ibid*, 37.

57 *ibid*, 45–46. Similarly: 274; Hayek, *Serfdom* n 17 above, 37, 39–41; Hayek, *Constitution* n 26 above, 62.

58 Schotter, n 47 above, 147.

59 R. Coase, ‘The Nature of the Firm’ (1937) 4 *Economica* 386; R. Coase, ‘The Problem of Social Cost’ (1960) 3 *JLE* 1.

60 O. Williamson, ‘The Economics of Antitrust: Transaction Cost Considerations’ (1974) 122 *UPaLRev* 1439, 1442–1447.

61 O. Williamson, ‘Markets and Hierarchies: Some Elementary Considerations’ (1973) 63 *American Economic Review* 316.

62 O. Williamson, ‘Credible Commitments: Using Hostages to Support Exchange’ (1983) 73 *American Economic Review* 519, 520.

63 This account is based upon: Schotter, n 47 above; W. Kasper and M. Streit, *Institutional Economics: Social Order and Public Policy* (Cheltenham: Edward Elgar, 1998); C. Mantzavinos, *Individuals, Institutions, and Markets* (Cambridge: CUP, 2001).

64 Schotter, *ibid*, 149–150; Vanberg, n 47 above, 77; Kasper and Streit, *ibid*, 3; Mantzavinos, *ibid*, 166.

65 Kasper and Streit, *ibid*, 44–45; Mantzavinos, *ibid*, 86.

66 Schotter, n 47 above, 11; Kasper and Streit, *ibid*, 28.

67 Schotter, *ibid*, 6; Mantzavinos, n 63 above, 167–168.

68 Schotter, *ibid*, 28–29; Kasper and Streit, n 63 above, 100, 116–117.

69 Schotter, *ibid*, 109, 118; Kasper and Streit, *ibid*, 1–3, 95, 118; Mantzavinos, n 63 above, 89.

70 Schotter, *ibid*, 139; Vanberg, n 47 above, 18; Kasper and Streit, *ibid*, 95–96; Mantzavinos, *ibid*, 87.

markets more efficient by systemically reducing uncertainty, so that actors can more effectively respond to the price mechanism.⁷¹

The economic significance of legal certainty is as follows. Institutions are informational cues upon which market actors rely to facilitate their spontaneous ordering through the price mechanism, with the framework of legal norms constituting one of the most important signals. But if particular laws are to be effective institutions—economising on information, delineating rights and obligations—for efficient decentralised coordination, they ought to be comprehensible to actors (clear, public, prospective, etc).⁷² NIE is premised upon roadblocks to rational decision-making and investigates how institutions arise to counteract uncertainty: this is not simply about *having* institutions which shape economic behaviour, but of how their formal nature can amplify their effectiveness.⁷³ This is functionally equivalent to what Kasper and Streit call the ‘normative impact’ of institutions.⁷⁴ Given that laws are informational signals facilitating the efficient operation of a free market economy, they argue that the formal rule of law is ‘essential to the proper functioning of the capitalist system.’⁷⁵

The suggestion that legal certainty stabilises expectations and facilitates the optimal operation of economic forces has roots in the writing of noted Ordoliberal Franz Böhm. According to Böhm, the optimal ‘functioning of the free market system presupposes the existence of the private law society’,⁷⁶ the normative framework shaping all economic interactions.⁷⁷ Ernst Mestmäcker, his student and formative influence upon EU competition policy, has synthesised Böhm’s theory and NIE to stress that comprehensible laws are amongst the foundational institutions of market economies by providing ‘expectations that people can rely on’.⁷⁸ The same is deducible from Hayek’s reflections on the state’s role in maintaining the framework within which markets operate. Ideally they should reflect *nomos*, Hayek’s later articulation of the formal rule of law, owing to its facilitation of legal certainty: mutual adjustment to the price mechanism is more effective where ‘there is a known delimitation of the sphere of control of each individual’.⁷⁹ Essentially, if we want rational actors to pursue their own ends for the benefit of all, they must reliably know the boundary between legality and illegality.⁸⁰

To summarise the justification from NIE for the economic significance of comprehensibility, this formal ideal makes law an effective institution: a regulatory framework more predictably and precisely communicating rights

71 Schotter, *ibid*, 109; D. Schmidtchen, ‘German “Ordnungspolitik” as Institutional Choice’ (1984) 140 *Journal of Institutional and Theoretical Economics* 54, 67; Mantzavinos, *ibid*, 214–215.

72 Kasper and Streit, n 63 above, 96, 122–123 127, 137, 165–168; Tamanaha, n 13 above, 119, 121.

73 Kasper and Streit, *ibid*, 96.

74 *ibid*, 122.

75 *ibid*, 168.

76 F. Böhm, ‘Rule of Law in a Market Economy’ in H. Willgerodt and A. Peacock (eds) *Germany’s Social Market Economy: Origins and Evolution* (London: Palgrave Macmillan, 1989) 54.

77 *ibid*, 49–50.

78 E. Mestmäcker, ‘A Legal Theory without Law: Posner v. Hayek on Economic Analysis of Law’ (2008) 37–40 at <https://doi.org/10.2139/ssrn.1168422> (last visited 3 December 2020).

79 Hayek, *Constitution* n 26 above, 140.

80 *ibid*, 140–141.

and obligations to economic actors, within which spontaneous market-based ordering through the price mechanism can occur in confidence.

Behavioural economics: friend or foe of the formal rule of law?

Before continuing to articulate why other principles of the formal rule of law are significant, it is necessary to address one part of *Competition, Effects and Predictability* which perhaps raises more questions than it answers for proponents of realising the formal rule of law in competition enforcement.

In Chapter 4 Wardhaugh adopts the insights of behavioural economics to argue that contemporary enforcement fails to deliver legal certainty. Following Stucke's effort to translate the behavioural approach to law and economics scholarship⁸¹ into antitrust,⁸² Wardhaugh offers a thorough account of its main findings (127–139). Rather than the absolute rationality assumed by neo-classical price theory, where individuals consistently choose the most beneficial course of action available, empirical evidence indicates that rationality is bounded. While this is comparable to New Institutional Economics,⁸³ behavioural economics homes in upon the myriad biases and heuristics (rules of thumb) that systematically distort individual judgement and decision-making, producing outcomes that depart from rational utility maximisation. Examples include inertia, perceptions of fairness, favouring smaller short-term gains over greater long-term benefits, overestimating rare but vivid possibilities (for example plane crashes), and being influenced by irrecoverable past costs.⁸⁴ Wardhaugh utilises these phenomena to critique economic approaches to tying, predatory pricing, and market self-correction which all rely upon the rationality of consumers, businesses, and potential rivals respectively (139–149). He concludes that the assumption of unbounded decision-making leads to errors of underenforcement; a neo-classical / Chicagoan approach to competition law⁸⁵ is relying upon rational decisions that don't materialise to remedy anticompetitive harms.

As a critique of contemporary antitrust doctrines, there is little of surprise here. But what is puzzling is how Wardhaugh includes it within a work promoting the formal rule of law, which allows 'rational agents to plan and order their lives' (116).

His explanation is that the rule of law 'requires consistency between what the law says it does and what it in fact does' (116). Rooted in Fuller's discussion

81 C. Jolls, C. Sunstein, and R. Thaler, 'A Behavioral Approach to Law and Economics' (1998) 50 *Stan LRev* 1471.

82 For example A. Reeves and M. Stucke, 'Behavioral Antitrust' (2011) 86 *Indiana LJ* 1527; M. Stucke, 'Behavioral Antitrust and Monopolization' (2012) 8 *JCLE* 545.

83 cf P. Corr and A. Plagnol, *Behavioral Economics: The Basics* (Oxford: Routledge, 2019) 135–137 (on social norms); C. May, 'Market Exchange and the Rule of Law: Confidence in Predictability' (2018) 10 *HJRL* 365 (taking behavioural insights to reach conclusions on the rule of law closer to institutional economics).

84 See Corr and Plagnol, *ibid*, 89–118; Jolls, Sunstein, and Thaler, n 81 above, 1476–1487; Reeves and Stucke, n 82 above, 1532–1545; M. Walker, 'Behavioural Economics: The Lessons for Regulators' (2017) 13 *ECJ* 1, 4–11.

85 See R. Stones, 'The Chicago School and the Formal Rule of Law' (2018) 14 *JCLE* 527, 533–542.

of congruence between ‘official activity and rule’ (116),⁸⁶ Chapter 4 finds a ‘divergence from the stated goal’ (117) of welfare maximisation owing to an overreliance on rationality, allowing harmful practices to continue.

Be that as it may, the analytical lens adopted by Wardhaugh to query the link between the goal/s of competition law and its outcomes raises a significant question: is behavioural economics a friend or a foe to the formal rule of law ideal? Wardhaugh is not alone in assuming harmony.⁸⁷ But this part has argued that the political and economic virtues of comprehensible laws lie in their connection to *individual rationality*. New Institutional Economics, above, accepts that rationality is bounded. Market actors cannot know everything and commonly rely on institutions (for example prices, laws) to inform and stabilise their course of action. But while New Institutional Economics focuses upon *external* obstacles to rational decision-making – unknowable information, the uncertain conduct of others – behavioural economics looks at the *internal* cognitive biases and use of imperfect heuristics which ‘induce systematic error into the reasoning process’ (130). How are we to reconcile the alleged downfall of rational *homo economicus* at the hands of behavioural insights with promotion of the rational legal agent envisaged by the formal rule of law?

This question might be thought redundant. Thaler and Sunstein’s influential repackaging of behavioural economics as ‘nudge’ theory⁸⁸ has caused alterations to laws, policies, and guidance to steer citizens towards selecting ‘better’ outcomes. Legally, this has often taken the form of altering default positions (for example utilising inertia to increase organ donation or pension payments by making schemes opt-out).⁸⁹ In the field of competition policy, it could be suggested that coherence between behavioural insights and predictable legal tests can be achieved by incorporating the empirical findings of the former into the design of the latter, as is Wardhaugh’s overall recommendation (11–12, 211–212, 222). Alternatively, providing soft law guidance on the scope of competition norms could counterbalance the biases of bounded rationality, allowing subjects to more effectively choose the path of legality.⁹⁰

However, it is unclear whether these possible reconciliations solve the economic irrationality / legal rationality conundrum. First, incorporating behavioural economics into the design of comprehensible laws would require its empirical findings to be generalisable and predictable deviations from rationality; not ‘random’ or ‘impossible’ to foresee but something that can be ‘modelled’.⁹¹ For instance, that consumers *generally* don’t price the costs of secondary markets into purchasing the primary product, or that firms *often do* engage in irrational predation, with potential competitors *likely* to not counterbalance

86 Fuller, n 14 above, 81–91, also discussed below.

87 Reeves and Stucke, n 82 above, 1543; M. Stucke, ‘Does the Rule of Reason Violate the Rule of Law?’ (2009) 42 UC Davis LRev 1375, 1480.

88 R. Thaler and C. Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* (New Haven, CT: Yale University Press, 2008).

89 R. Lepenies and M. Malecka, ‘The Institutional Consequences of Nudging – Nudges, Politics, and the Law’ (2015) 6 Rev Philosophy and Psychology 427, 430.

90 G. de Moncuit, ‘Relevance and Shortcomings of Behavioural Economics in Antitrust Deterrence’ (2020) 11 JECL & Pract 228, 233–234.

91 Jolls, Sunstein, and Thaler, n 81 above, 1471, 1475, 1477–1478.

post-predation recoupment through entry. While some argue that this is possible,⁹² one proponent of behavioural law and economics labels this a ‘fundamental methodological error’.⁹³ Tor suggests that behavioural findings cannot be generalised from their specific context without losing the considerable heterogeneity of behaviour, whether between firms and consumers on the same market or even the same decision-maker in differing contexts.⁹⁴ The mixed lessons of behavioural economics for designing predictable laws also relates to the clash between conflicting biases: how do we know whether businesses will succumb to inertia and overestimate negative outcomes, warning against market entry, or the bias of overconfidence, incentivising even unwise entry?⁹⁵ Such overall ambiguity often leads advocates of incorporating behavioural insights into antitrust to champion the factual sensitivity of effects-based standards, thereby accounting for the biases and heuristics of the specific actors on the market in question.⁹⁶ But as Wardhaugh argues throughout *Competition, Effects and Predictability*, this method for determining illegality is the antithesis of achieving the certainty of the formal rule of law. Is Chapter 4 supporting an approach to antitrust that actually reduces predictability?

The second issue is whether nudge theory as implemented really realises both the rule of law and the lessons of behavioural economics. On the first goal, its most prevalent policy consequence of altering default scenarios is, despite being clear, unlike the ideal envisaged of the rational actor under the formal rule of law. Rather than internalising the law, understanding rights and obligations to plan action, a different default is imposed to deliberately exploit inertia, hoping that subjects *won't* actively engage and opt-out. The legal form of nudge theory has been stylised ‘law-as-instrumental’ as it is not dependent upon individuals understanding and reacting to its requirements.⁹⁷ If anything, quite the opposite. In contrast to the formal rule of law ideal that Wardhaugh champions, the law used to nudge citizens therefore doesn't need to be comprehensible to subjects.⁹⁸ On whether nudge theory is true to behavioural economics, consider the alternative policy of providing more information to thwart cognitive biases. Does this cohere with the foundational tenet that bounded rationality prevents the processing of significant amounts of data in deciding what to do, causing reliance upon imperfect heuristics? It is for this reason that Thaler and Sunstein's nudge theory has been criticised as actually rehabilitating the rationally unbounded *homo economicus* through providing solutions to overcome cognitive limitations.⁹⁹ Analogies could be drawn with incorporating behavioural

92 Jolls, Sunstein, and Thaler, *ibid*; Walker, n 84 above, 3, 26.

93 A. Tor, ‘Understanding Behavioral Antitrust’ (2014) 92 Texas LRev 573, 579.

94 *ibid*. Similarly: R. Van den Bergh, ‘Behavioral Economics: Not Ready for the Main Stage’ (2013) 9 JCLE 203, 214; de Moncuit, n 90 above.

95 Van den Bergh, *ibid*, 214–216; de Moncuit, *ibid*, 236.

96 For example G. Niels, R. Van Dyck, and L. Fields, ‘Behavioral Economics and its Impact on Competition Policy: A Practical Assessment’ (2013) 12 Comp Law 374, 379; Tor, n 93 above, 651 (albeit recognising the ‘significant challenges’ for predictability).

97 Lepenies and Malecka, n 89 above, 431.

98 *ibid*, 432.

99 Corr and Plagnol, n 83 above, 166–169, summarising G. Infante, G. Lecouteux, and R. Sugden, ‘Preference Purification and the Inner Rational Agent: A Critique of the Conventional Wisdom of Behavioural Welfare Economics’ (2016) 23 *Journal of Economic Methodology* 1.

economics into the design of clear and predictable legal tests for antitrust. There is something jarring in addressing bounded rationality by altering the law, a collection of norms that individuals are expected to internalise and act upon. Wardhaugh's claim at the end of Chapter 4 that law 'must be capable of being addressed by (boundedly rational) human beings' by absorbing behavioural findings may be expecting allegedly irrational economic actors to rationally engage with the law.

It is not possible here to do justice to the gargantuan question of whether behavioural economics is friend or foe to advocates of the formal rule of law. This friction is acute in Chapter 4 of *Competition, Effects and Predictability*, where Wardhaugh adopts the findings of a field premised on the irrationality of individuals in a book advocating the rationality-respecting formal rule of law. Absent a justification for assuming coherence between the two, Wardhaugh's account may itself be accused of incongruence between its goals and outcomes. In contrast, there is another dimension to the formal rule of law that doesn't rely on rationality to the same extent. Given Wardhaugh's ambiguous message in Chapter 4, it is unfortunate that it is barely mentioned.

GENERALISED LAWS OF EQUAL APPLICATION

Principle 2 – *Generalised laws of equal application*: two mutually reinforcing ideals.¹⁰⁰ First, generalisation relates to *normative scope*: laws are abstracted away from particular individuals and situations that can be brought within their ambit. Second, equal application concerns *enforcement*: law is applied equally to all instances falling within its scope, consistent with past and future enforcement. The antithesis of this is subject-specific legal determination based upon individual circumstances, usually achieved through discretion or *ex post* consequentialist analysis.

The aspiration towards generalised norms of equal application is a perennial element of the formal rule of law, included by Fuller and Raz who Wardhaugh bases his conceptualisation upon (19). Yet a discussion of generality is absent from Chapter 1. It isn't until page 210 that Wardhaugh notes '[g]ood rules, from an administrative perspective, have an element of generality to them'. But even then, this is justified by decisional cost-savings – of being content with correct application to most, not all instances – rather than any compelling political or economic virtue. This accords with Frank Easterbrook's work and the 'Neo'-Chicagoan emphasis upon error and enforcement costs, which ought to be considered when deciding whether to determine legality through imperfect generalisations or (notionally) perfect case-specific analysis.¹⁰¹ But is that it? If decision-makers never made errors and minimised administrative costs, should competition lawyers stop caring about generality? This section will remedy the gap in *Competition, Effects and Predictability* by demonstrating the political and economic significance of aspirations towards generalised laws of equal application.

100 M. Radin, 'Reconsidering the Rule of Law' (1989) 69 Boston ULR 781, 785.

101 Stones, n 85 above, 549–553, and the works cited in n 11 above.

Political significance

Returning to the tense relationship between freedom and coercion at the heart of liberalism, while the first principle of the formal rule of law was directed towards facilitating rational decision-making, generalised laws of equal application restrain centralised power by formally preventing subject-specific legal determinations. In committing to laws abstracted from particulars and unwavering in their application, the benefits of imperfect rigidity are argued to outweigh the detriments of inflexibility to circumstances.¹⁰²

For many *liberal* theorists, limiting coercion to generalised laws of equal application constitutes a politically valuable bulwark beyond more frequently lauded constitutional mechanisms (for example limited competence conferral, rights). The preference for this legal form over subject-specific determinations of legality is recurrent throughout liberal writing: Locke's advocacy of 'a standing Rule to live by, common to every one' as opposed to the 'inconstant, uncertain, unknown, arbitrary Will of another Man',¹⁰³ Dicey's championing of laws applying to all, not 'of arbitrary power', prerogative, or broad administrative discretion,¹⁰⁴ Hayek's distinctions between the 'Rule of Law' and '*ad hoc* action',¹⁰⁵ 'abstract rules' and 'particular commands',¹⁰⁶ or, in his later work, '*nomos*' and '*thesis*';¹⁰⁷ Raz contrasting the restraint of the formal rule of law with the 'arbitrary power' to issue 'particular legal orders',¹⁰⁸ or Rawls on the justice of 'regularity' in one's dealings through the restrained enforcement of impartial laws.¹⁰⁹

The common justification for preferring the application of generalised laws over more discriminating determinations of legality concerns liberty: formally preventing *ad hoc*, subject-specific evaluations of permitted and prohibited leaves subjects freer to pursue their ends within the known limits of the law.¹¹⁰ The value of abstraction was at the core of Kant's *Doctrine of Right*: state coercion is rightful when enforcing universal laws guaranteeing the mutual freedom of all.¹¹¹ The result is 'a constitution in which law itself rules and depends on no particular person',¹¹² cautioning against the conferral of open-ended powers to determine rights and obligations in an individualised manner.¹¹³ Such

102 Hayek, *LLL* n 17 above, 194; F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991) 31–33; R. Epstein, *Simple Rules for a Complex World* (Cambridge, MA: Harvard University Press, 1995) 38–39, 53; F. Schauer and R. Zeckhauser, 'Regulation by Generalization' (2007) 1 *Regulation and Governance* 68.

103 Locke, n 26 above, [S22].

104 A. Dicey, *Introduction to the Study of the Law of the Constitution* (1915, Indianapolis, IN: Liberty Fund, 8th ed, 1982) 120–121.

105 Hayek, *Serfdom* n 17 above, 75–76.

106 Hayek, *Constitution* n 26 above, 131.

107 Hayek, *LLL* n 17 above, chs 5 and 6.

108 Raz, n 15 above, 219.

109 Rawls, n 42 above, 206–209.

110 Locke, n 26 above, [S22], [S57], [S137]; Dicey, n 104 above, 110; Unger, n 16 above, 69–70.

111 Kant, n 25 above, 397, 388–389.

112 *ibid.*, 480–481.

113 A. Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009) 211–212.

abstraction generates end-independent obligations that otherwise afford the freedom to do as one wishes.¹¹⁴ For Habermas, the Kantian notion of generalised norms guaranteeing equal spheres of autonomy goes to the very concept of law.¹¹⁵ Kant's advocacy of formal legal equality was central to later theorising on the *Rechtsstaat* through the nineteenth century,¹¹⁶ to which Hayek's conceptualisation of law as *nomos*, 'purpose-independent rules',¹¹⁷ is arguably indebted. Through the process of abstraction beyond specifics,¹¹⁸ laws become reliable 'data' upon which individuals can plan.¹¹⁹ Autonomy shifts from the decision-maker to the subject as generalised laws rigidify determinations of legality, removing the discretion to prohibit and permit conduct reactively.¹²⁰ For Locke, this restricted the 'Tyranny' of 'arbitrary and irregular commands' that may 'impoverish, harass, or subdue' individuals.¹²¹ It is a formal bulwark against a discriminatory 'reign of status',¹²² the '*ad hoc* application of state power against individuals or groups singled out for special treatment'.¹²³ Without particularistic legal decision-making, the 'cost of oppression'¹²⁴ increases as generalised reductions of liberty hold friends 'hostage' with enemies.¹²⁵ It also prevents beneficial economic privileges as a result of lobbying, discussed below.

There are undoubtedly limits to the realisation of this desideratum. The general scope of laws often falls short of universality, resulting in different categories of legal subject (landlord, employer, dominant undertaking).¹²⁶ Still, so long as the categories are not sham placeholders for individuals or small groups, and norms are applied equally to all in the category, the worst excesses of discriminatory, individualised determinations are avoided, and this lauded political benefit of the formal rule of law may be approximated.

Economic significance

According to New Institutional Economics (NIE), the framework of laws surrounding market behaviour has an impact upon spontaneous economic ordering. But in recognising their formative role in the economy, this makes

114 I. Kant, 'On the Common Saying: That May be Correct in Theory, but is of No Use in Practice' in Gregor, n 25 above, 291; M. Gregor, *Laws of Freedom* (Oxford: Basil Blackwell, 1963) 28, 37–38, 46.

115 Habermas, n 20 above, 82–83.

116 W. Von Humboldt, *The Sphere and Duties of Government* (London: John Chapman, 1854) 117; E. Böckenförde, 'The Origin and Development of the Concept of the *Rechtsstaat*' in *State, Society and Liberty: Studies in Political Theory and Constitutional Law* (New York, NY: Berg, 1991) 50.

117 Hayek, *LLL* n 17 above, 82.

118 *ibid.*, 205.

119 Hayek, *Constitution* n 26 above, 20. Similarly, *ibid.*, 53, 132, 270; Hayek, *Serfdom* n 17 above, 61–62, 76.

120 *ibid.*, 131–132, 134–135.

121 Locke, n 26 above, [S199]–[S201]. Similarly, Dicey, n 104 above, 111; Raz, n 15 above, 219; Unger, n 16 above, 70, 177; Rawls, n 42 above, 209.

122 Hayek, *Constitution* n 26 above, 135.

123 Epstein, n 28 above, 20.

124 R. Posner, *Economic Analysis of Law* (Austin, TX: Aspen Publishers, 7th ed, 2007) 266.

125 Epstein, n 28 above, 67. Similarly: Hayek, *Constitution* n 26 above, 135–136, 184; Summers, n 19 above, 139; Tamanaha, n 13 above, 71.

126 Leoni, n 26 above, 68–69; Waldron, n 41 above, 81–82; Tamanaha, n 13 above, 94.

institutions particularly valuable assets for private actors who may wish to influence market outcomes. Once again, NIE reaches comparable conclusions to liberal political theory on the desirability of the formal rule of law. As Wardhaugh briefly implies (207), generalised and equally applicable laws limit private manipulation of economic outcomes more decisively than when subject-specific determinations of legality are permissible.

Hayek's final volume of *Law, Legislation and Liberty* is an extended assault upon 'para-government', the assemblage of interests that circle centralised decision-making and intend to divert 'the stream of governmental favour to their members'.¹²⁷ The endeavours of these groups are manifold: limiting entry to certain trades to restrict output;¹²⁸ fixing prices for specific industries;¹²⁹ raising import tariffs to shield domestic firms;¹³⁰ designating cartels or monopolies for legal protection;¹³¹ disadvantaging successful businesses to shield less efficient rivals.¹³² These subject-specific interventions intend to 'bring about a particular result which is different from that which would have been produced if the mechanism had been allowed unaided to follow its inherent principles'.¹³³ Hayek's caution was not novel. Adam Smith warned against private efforts to secure governmental privileges that artificially distort market forces.¹³⁴

Hayek's criticisms are closely related to public choice theory. Its concern is the principal-agent problem between citizens and state actors: that those entrusted with centralised decision-making powers may act opportunistically or against the common good owing to the costliness of monitoring.¹³⁵ As a result, organised private interests may come to direct state powers to their own ends. Profitable privileges can be accrued by successfully negotiating market interventions that lessen competitive forces (closing entry, restricting imports, protective regulations).¹³⁶ This risk is heightened with a small focused collection of market actors as the spoils are shared between fewer beneficiaries.¹³⁷ But maintaining the competitiveness of the free-market economy is not simply about preventing privately-desired regulation. As the Ordoliberal forewarned,¹³⁸ competition policy may be a prominent target of lobbying for and against interventions.¹³⁹ Therefore to guarantee the optimal operation of the free market,

127 Hayek, *LLL* n 17 above, 356.

128 Hayek, *Constitution* n 26 above, 199; Hayek, *LLL* *ibid*, 175, 426.

129 Hayek, *LLL* *ibid*, 300.

130 *ibid*, 353.

131 Hayek, *Serfdom* n 17 above, 48; Hayek, *LLL* *ibid*, 413, 423.

132 Hayek, *LLL* *ibid*, 417.

133 *ibid*, 287.

134 Smith, n 48 above, 228, 231–232, 358–359.

135 Kasper and Streit, n 63 above, 65. See also: M. Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities* (New Haven, CT: Yale University Press, 1982) 17–19.

136 M. Green and R. Nader, 'Economic Regulation vs Competition: Uncle Sam the Monopoly Man' (1973) 82 YLJ 871, 879; Olson *ibid*, 43–47, 59–60, 62–65; Kasper and Streit, *ibid*, 247–248, 285, 324–326; V. Vanberg, 'Ordnungspolitik, The Freiburg School and the Reason of Rules' (2014) 21 *i-lex* 205, 217.

137 Olson, *ibid*, 29–31.

138 For example W. Eucken, 'The Competitive Order and its Implementation' (2006) 2 *Competition Policy International* 219, 241.

139 See F. McChesney and W. Shughart (eds) *The Causes and Consequences of Antitrust: The Public-Choice Perspective* (Chicago, IL: University of Chicago Press, 1995).

preventing anticompetitive regulations and defending a robust competition policy, it is necessary to erect 'institutional constraints on competition for political favours'.¹⁴⁰

While public choice theory warns against private steering of centralised power in the economy, constitutional economics aims to provide a solution by interpreting binding norms (discrete competences, fundamental rights) as pre-commitment mechanisms.¹⁴¹ For example, although content with how a benevolent dictator currently exercises their omnipotence, we may fear that their unknown successor could use unbounded power for oppression. Similarly, a decision-maker may now believe that long-term policy success is based upon doing X (eg prohibiting cartels), but later emergencies could lead them to abandon X and do Y (accepting crisis cartels to manage job losses). In both instances, constraints are formulated *today* to prevent undesirable outcomes in the unpredictable *future*.

Taken together, public choice theory and constitutional economics advocate tying the hands of public actors for when 'they are tempted to abandon principles' on an as-needed basis.¹⁴² Although various substantive requirements could be contemplated to limit market-distorting regulation and impressionable competition enforcement, the simplest preventative measure is to formally restrain the state from discriminatory actions in the market by determining legality through applying generalised norms.¹⁴³ This prevents the granting of individualised legal privileges to private interests, thus shielding the continuing operation of the free market order.¹⁴⁴ Hayek applied this logic to cartel law, cautioning against 'discretionary surveillance to prevent abuse' and favouring a general prohibition without exception.¹⁴⁵

Formally restricting centralised interventions in the economy is controversial. As argued below, this cautious logic coheres with the liberal economic convictions underpinning competition enforcement. Still, it should be noted that similar worries have occupied consumer rights advocates¹⁴⁶ and less politically-charged economists than those above.¹⁴⁷ Decision-makers abandoning the common good by reflecting exogenous influence is a perennial worry across the political spectrum. But particularly for those extolling the virtues of free markets, the rule of law ideal is of considerable economic benefit: mandating market interventions (regulation, competition enforcement) through the equal application of generalised laws formally prevents *ad hoc* determinations of legality artificially favouring some market actors over others.

140 Kasper and Streit, n 63 above, 249.

141 See: G. Brennan and J. Buchanan, *The Reason of Rules: Constitutional Political Economy* (Cambridge: CUP, 1985) 74-79; Vanberg, n 47 above; Mantzavinos, n 63 above, 243-244.

142 Kasper and Streit, n 63 above, 335.

143 Hayek, *LLL* n 17 above, 359, 439, 463. Similarly Brennan and Buchanan, n 141 above, 29.

144 Kasper and Streit, n 63 above, 316; Mantzavinos, n 63 above, 244-245; Vanberg, n 136 above, 211, 218.

145 Hayek, *LLL* n 17 above, 423-424.

146 For example Green and Nader, n 136 above, 876.

147 For example Olson, n 135 above.

The generalisation trade-off and competition law

Perhaps one of the reasons Wardhaugh avoids discussing generalised laws, a motif of the formal rule of law, is its controversy in contrast to legal certainty. There is a difficult trade-off between the positives of both generalised norms, blind to individual circumstances, and subject-specific determinations that can reflect contextual factors. Conflicting evaluations are unavoidable. It is not inherently more 'just' to treat all instances the same, rather than recognising particularities of circumstance.¹⁴⁸

The above articulation of the political significance of generalised and equally-applied laws comes from the liberal tradition. When faced with centralised power to take individualised decisions, the reaction is understandably cautious, fearing the worst and preferring a more restrained form. The same is true for its economic value: limiting *ad hoc* interventions seems wise to those favouring decentralised, market-based ordering over greater state interference in the economy. But not everyone will reach the same conclusion.

Disapproval of aspiring towards generalised laws is common in Marxist and critical legal scholarship. Marx's early writings analysed the separation between the abstracted political sphere, where individuals enjoy formal legal equality under generalised laws, and the reality of civil society, where everyday life is marked by inequalities.¹⁴⁹ The liberal interpretation of the formal rule of law thus masked and legitimated injustice,¹⁵⁰ an approach subsequently refined by Bolshevik jurist Evgeny Pashukanis to a pre-condition for capitalism¹⁵¹ and a means of class subjugation.¹⁵² These themes – the false equality of abstract laws, the legitimating relationship between liberal legalism and capitalist power dynamics – recurred throughout the 1970s and the 1980s, not just in Marxist writing on the formal rule of law,¹⁵³ but also within the Critical Legal Studies movement.¹⁵⁴ Nonet, Selznick, and Unger all detailed how aspirations toward legal equality, ignoring material circumstance, clashed with post-war endeavours towards substantive justice through bureaucratic decision-making by the welfare state.¹⁵⁵

These criticisms of generalisation are serious but not fatal. Since the 1970s, some have softened their assault, adopting a more nuanced middle-ground which recognises the important struggles for basic legal equality by women

148 Schauer, n 102 above, 136–137.

149 K. Marx, *Critique of Hegel's Philosophy of Right*, J. O'Malley (ed), A. Jolin and J. O'Malley (trans) (1843, Cambridge: CUP, 1970) 72–73, 77–78, 116; K. Marx, "'On the Jewish Question'" in J. O'Malley (ed) *Marx: Early Political Writings* (Cambridge: CUP, 1994) 36, 48.

150 Marx, *Hegel* *ibid*, 80–81, 137; Marx, 'Jewish Question' *ibid* 34–38, 43–48.

151 E. Pashukanis, *The General Theory of Law & Marxism*, C. Arthur (ed), B. Einhorn (trans) (1924, New Brunswick: Transaction Publishers, 2002) 68, 82–88, 93, 115, 120–121.

152 *ibid*, ch 5.

153 For example I. Balbus, 'Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law' (1979) 11 *Law & Society Review* 571; M. Horwitz, *The Rule of Law: An Unqualified Human Good?* (1979) 86 *Y LJ* 561; H. Collins, *Marxism and Law* (Oxford: OUP, 1982) 136–140.

154 R. Unger, 'The Critical Legal Studies Movement' (1983) 96 *HLR* 561.

155 Unger, n 16 above, 179, 192–199, 204–205; Nonet and Selznick, n 16 above, 54, 57, 60–64.

and minority groups.¹⁵⁶ Nonet, Selznick, and (early) Unger themselves exhibited reservations about abandoning the formal rule of law in pursuit of subject-specific discretionary determinations of what would be the ‘just’ outcome in the instant case.¹⁵⁷

But particularly when focusing upon the field in hand, solving the generalisation trade-off differently becomes more persuasive. Competition lawyers should take seriously the *liberal* political and economic significance of aspiring to generalised, equally-applicable laws *because competition enforcement is a liberal endeavour*. It is founded upon the benefits of a decentralised, free market economy over centralised direction of economic forces, while accepting that interventions are necessary to remedy distortions by market actors. This goes directly to why the economic significance of generalised norms (reducing state-based interference, preventing privileges and discriminatory enforcement) should be given credence by competition lawyers. But it also relates to its political significance and ideological consistency: how can one fear discriminatory decision-making, manipulation by private interests, and the impact upon individual autonomy in the economic realm but reach contrary conclusions on the significance of generalised laws in the political realm?

The principle of the formal rule of law that laws be generalised and equally applied comes at a cost. This part has articulated how the trade-off has generally been resolved by political liberals and free marketeers. While those of differing dispositions may disagree, aspiring towards generalised laws of equal application is significant when one starts from the political and economic liberalism underpinning *competition policy*.

JUDICIAL REVIEW AND ADJUDICATION

Principle 3 – *Judicial review and adjudication*: an independent mechanism for reviewing legal determinations, including the source of decision-making power and the legal meaning of conditions conferring power (for example prohibiting ‘anticompetitive’ conduct). This mechanism also adjudicates legal disputes between ordinary subjects, enforcing rights and obligations. The antithesis of this is either the lack of review and adjudication, or, if review exists, where a decision-maker enjoys deference: the absence of scrutiny of its determinations of legality, particularly with regards to the law and legal characterisation of facts.

The formal principles of the rule of law advanced hitherto are aspirational ideals. This they would probably remain without judicial review and adjudication. It will be argued that this third *institutional* aspiration is of key instrumental value to the realisation of the two *formal* principles. First, it ensures congruence between law and life. The formal rule of law is meaningless if reality cannot be made to match the law. Second, adjudication and review present

156 For example B. Fine, *Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques* (London: Pluto Press, 1984) 1–2.

157 Unger, n 16 above, 238–249; Nonet and Selznick, n 16 above, 82–83, 117.

opportunities for reactive refinement towards generalised and comprehensible norms, rendering the formal rule of law a more achievable ideal.

Unlike generalised laws, courts *do* play a significant role in *Competition, Effects and Predictability*. The issue is Wardhaugh's analysis ranges from ambivalence on their importance for the formal rule of law (20, 23–24) to hostility: courts are the villain of Chapter 2 for expanding rule of reason analysis in US antitrust, and half of Chapter 5 suggests that jurisprudential shifts on the basis of evolving economic thinking are undemocratic (152–172). This is a misstep if Wardhaugh's intention is to persuade critics that the formal rule of law is important for competition enforcement. Without courts, the rule of law appears unrealistic and static in a field that is necessarily dynamic.

Congruence between law and reality

It would be naïve to exclude from even the thinnest conceptualisation of the rule of law any mechanism for independently checking that determinations of legality actually *are* legal and that there continues to be 'congruence between official action and declared rule'.¹⁵⁸ Wardhaugh recognises this (116). Law cannot inform individual planning or market choices if rights and obligations are unenforceable and transgressions by decision-makers or third parties are unchallengeable.

The independence of the judiciary was part of Montesquieu's account of the separation of powers.¹⁵⁹ Locke also stressed how property was insecure in despotic societies lacking enforcement and adjudication by independent courts.¹⁶⁰ But Montesquieu also emphasised the principle of *nulla poena sine lege*: no punishment without law.¹⁶¹ Dicey interpreted this notion as a fundamental requirement of the rule of law, standing for the proposition that no one 'can be made to suffer punishment or to pay damages for any conduct not definitely forbidden by law'.¹⁶² This is an admittedly austere requirement of rule *by* law. Positivist nineteenth-century articulations of the *Rechtsstaat* have particularly been critiqued for simply legitimating authoritarianism.¹⁶³ But rule *by* law is a necessary precondition for the additional formal desiderata of the rule *of* law.¹⁶⁴ Hayek therefore claimed that judicial review of the legality of administrative decision-making was actually a significant legacy of positivist thinking on the *Rechtsstaat*.¹⁶⁵ Several theorists thus include judicial oversight among the 'basic institutional conditions that bolster the formal qualities of rule-based order,

158 Fuller, n 14 above, 81.

159 Montesquieu, n 29 above, 198–199.

160 Locke, n 26 above, [S91], [S124]–[S126].

161 Montesquieu, n 29 above, 197.

162 Dicey, n 104 above, lv. See also 110–111.

163 For example L. Krieger, *The German Idea of Freedom: History of a Political Tradition* (Chicago, IL: University of Chicago Press, 1957) 254–255; M. Loughlin, *Foundations of Public Law* (Oxford: OUP, 2010) 318.

164 Hayek, *Constitution* n 26 above, 173–174, 181.

165 *ibid*, 185. See also: Böckenförde, n 116 above, 54–55.

converting it into an operative regime'.¹⁶⁶ Indeed, some go so far as to claim it is a necessary element of the concept of law itself.¹⁶⁷

Reactive refinement towards the formal rule of law

Beyond ensuring congruence between law and reality, adjudication and judicial review provide key opportunities for the legal order to be dynamically reformulated towards the formal ideals of generality and comprehensibility.

Achieving legal certainty is an on-going process that is never complete. Normative ambiguity is unavoidable. There will always be questions regarding the application of laws at the periphery owing to factual novelty, technological development, and the open-textured vagueness of language.¹⁶⁸ In competition law, changes in our economic understanding of the consequences of business behaviour are an additional catalyst, prompting reappraisal of pre-existing norms. A static, unchanging collection of obligations unambiguously delineating legality is a fantasy. Rather than a binary quality, realising the formal rule of law is to approximate, but never reach, a politically and economically significant ideal.

But who is driving this dynamic revaluation, responding to factual, technological, linguistic, and economic uncertainty with clearer laws? The actor is conceptually irrelevant: it could be the legislature passing new statutes, the courts resolving disputes, or, where relevant, an administrative decision-maker enforcing obligations (for example prohibiting restrictions of competition or abuses of market dominance).¹⁶⁹ In reality, this is a collaborative endeavour, albeit uneven. As the infrequent substantive pronouncements of EU legislators on antitrust demonstrate,¹⁷⁰ day-to-day refinement of legal obligations primarily occurs elsewhere.

Adjudication of disputes by courts is key to the dynamic evolution of a legal order and ultimately, its gradual approximation of the formal rule of law. As Hayek suggested, courts curate the substance *and* form of law.¹⁷¹ Wherever ambiguity arises, adjudication offers the route to 'gradual perfection'.¹⁷² Cases are Janus-faced: while parties often litigate reactively to resolve specific disputes, they are simultaneously opportunities for prospective

166 Loughlin, n 163 above, 335. For example Hayek, *Constitution* n 26 above, 174, 185; Raz, n 15 above, 216–218; Unger, n 16 above, 177; Nonet and Selznick, n 16 above, 54; Habermas, n 20 above, 173; Rawls, n 42 above, 209–210.

167 J. Waldron, 'The Concept and the Rule of Law' (2008) 43 *GalRev* 1, 20, 55–57. Similarly: Habermas, n 20 above, 134.

168 Radin, n 100 above; Schauer, n 102 above, 35–36; C. Sunstein, 'Problems with Rules' (1995) 83 *CalRev* 953, 984–985; T. Endicott, 'The Impossibility of the Rule of Law' (1999) 19 *OJLS* 1, 6–7.

169 cf M. Shapiro, *The Supreme Court and Administrative Agencies* (New York, NY: Free Press, 1968) 44–45, 91–93.

170 Aside from occasional block exemption and sectoral regulations, Article 101 and 102 TFEU inherited from the Treaty of Rome 1957 continue to be the main provisions.

171 Hayek, *LLL* n 17 above, 113.

172 *ibid.*, 96. Similarly: 191; Habermas, n 20 above, 144.

norm creation, reformulation, and elaboration.¹⁷³ Courts can clarify rights and obligations to reduce uncertainty and generalise their findings beyond the instant dispute to all, permitting wider cognisance of the boundary between legality and illegality. Precedents can collectively crystallise into a body of general and comprehensible norms, a gloss upon bare statute, thereby more closely approximating the rule of law ideal. Justice Scalia claimed that US antitrust law developed in this incremental manner from ambiguously worded origins in the Sherman Act to a more 'precise, principled content' for legal subjects as a result of the 'judicial craft'.¹⁷⁴

But reactive refinement by courts towards the rule of law is just as important – if not even more so – in the presence of an administrative decision-maker tasked with enforcing legal obligations (for example the European Commission). There is nothing conceptually preventing this institution from contributing to the gradual realisation of the formal rule of law. Its pattern of individual decisions could establish comprehensible norms of legality and illegality of general application to all, consistency enforced in past and future instances. Considering economic developments, technological change and business uncertainty, and mindful of avoiding retrospective illegality, it might also circulate informative guidelines on enforcement.

While possible, it is doubtful that administrative enforcement alone would deliver a legal order approximating the formal rule of law. Such decision-makers tend not to have exclusive jurisdiction to interpret legal obligations,¹⁷⁵ leaving their findings or guidance of uncertain precedential status. This instability is exacerbated by informal enforcement mechanisms.¹⁷⁶ But rather than comprehensibility, it is the equal application of generalised norms that is less likely to materialise from administrative enforcement alone. Inequality in the application of law, or enforcement discretion, is a corollary of limited time and finite budgets, making selective prosecution of notorious targets more appealing. Decision-makers cannot be expected to always think like administrative Immanuel Kants, transforming particulars into norms of universal application; it is legally sufficient for the specific factual instance investigated to meet the (usually broad) standard for valid enforcement ('restricting competition', 'abuse' of 'dominance') rather than to extrapolate more widely.

These risks demonstrate that judicial review is a valuable failsafe for gradually realising the formal rule of law. As with adjudication of disputes, review of administrative decisions offers courts the opportunity to translate particularised findings into generalised norms applicable to all, while also restricting and rigidifying future enforcement. It might not be necessary for judicial review to fulfil this function; enforcement decisions may create a legal order of generalised and comprehensible norms. But if administrative decisions do not cultivate this, the

173 S. Shavell, 'The Appeals Process as a Means of Error Correction' (1995) 24 JLS 379; D. Geradin and N. Petit, 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment' (2011) Tilburg Law School Legal Studies Research Paper 01/2011, 5–6.

174 A. Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 UChiLRev 1175, 1183.

175 For example Article 19(1) TEU.

176 R. Stones, 'Commitment Decisions in EU Competition Enforcement: Policy Effectiveness v. the Formal Rule of Law' (2019) 38 YEL 361, 383–384.

courts provide a fallback occasion for nevertheless approximating the formal rule of law. Without such, its realisation is left to administrative decision-makers who, as indicated throughout this piece, have incentives to avoid its restraint.

When shifting from theoretical ideal to practical reality, whether the Court of Justice of the EU (CJEU) lives up to this ideal in competition matters is debateable. With few Commission decisions pursuant to Articles 101 and 102 TFEU being subsequently overturned, the standard of review exercised by EU Courts under Article 263 TFEU has been a vexed issue for years.¹⁷⁷ But this is only part of the picture. The Courts could successfully approve every ‘correct’ and quash every ‘wrong’ decision without translating subject-specific, incomprehensible Commission findings into clearer legal obligations for all. Furthermore, when analysing whether the CJEU is curating a legal order approximating the formal rule of law, it is also necessary to consider its articulations of competition law in response to Article 267 TFEU preliminary reference requests which don’t involve prior Commission decisions. The CJEU’s overall record is mixed. On the one hand, it has crafted a series of presumptions of illegality: not just for restrictions ‘by object’ under Article 101 TFEU when economic learning suggests anticompetitive outcomes are likely,¹⁷⁸ but also for certain practices engaged in by dominant firms under Article 102 TFEU. A notable instance of the latter, where the CJEU did approximate the formal rule of law, is *AKZO Chemie BV v Commission*. The Court rejected the Commission’s desire for broad discretion to censure ‘unfair’ predation in favour of a clear presumption that prices below average variable cost are abusive.¹⁷⁹ The Court has also crafted a series of presumptions of legality for types of restrictive clauses (qualitative criteria for selective distribution¹⁸⁰ and common restrictions in franchising arrangements)¹⁸¹ and certain agreements (open exclusive licences¹⁸² and territorially exclusive copyright licencing arrangements).¹⁸³ On the other hand, the CJEU has posited subject-specific determinations of legality through effects-based analysis in key cases on exclusivity and single branding agreements.¹⁸⁴ Purely effects-based evaluations of lawfulness require the Commission to engage in complex factual analysis that takes many economists with information, resources, and expertise months to conclude; how are businesses to predict whether their agreements are legal? As is Wardhaugh’s central

177 See for example I. Forrester, ‘A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review’ in C. Elhermann and M. Marquis (eds), *European Competition Law Annual 2009: Evaluation of Evidence and its Judicial Review in Competition Cases* (Oxford, Hart: 2011); A. Kalintiri, ‘What’s in a Name? The Marginal Standard of Review of “Complex Economic Assessments” In EU Competition Enforcement’ [2016] 53 CMLRev 1283.

178 On judicial identification of restrictions by object, see C-67/13P *Groupement des Cartes Bancaires* ECLI:EU:C:2014:2204. Examples include price-fixing, market-sharing, exchanging sensitive information, and resale price maintenance.

179 C-62/86 *AKZO Chemie BV v Commission* ECLI:EU:C:1991:286 at [71], *contra ECS/AKZO* [1985] at [74] (Commission wanted to prohibit ‘[a]ny unfair commercial practices ... intended to eliminate, discipline or deter smaller competitors’).

180 C-26/76 *Metro-SB-Grossmärkte GmbH v Commission* (No 1) ECLI:EU:C:1977:167.

181 C-161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* ECLI:EU:C:1986:41.

182 C-258/78 *Nungesser v Commission* ECLI:EU:C:1982:211.

183 C-262/81 *Coditel SA and Others v Ciné Vog Films SA and Others* (No 2) ECLI:EU:C:1982:334.

184 C-56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* ECLI:EU:C:1966:38; C-234/89 *Delimitis v Henninger Bräu* ECLI:EU:C:1991:91.

argument, an ‘effects-based approach is a threat to the rule of law’ (2). At times the Courts have also condoned the Commission’s dilution of relatively clear legal tests by deferring to its legal characterisation of complex facts.¹⁸⁵ Finally, the rise of enforcement through individualised commitment decisions agreed between the Commission and investigated firms may be limiting the Courts’ ability to shape competition norms towards the ideals of comprehensibility and generality; a combination of judicial reluctance to incisively scrutinise commitment decisions that *do* come before them¹⁸⁶ and the inability to review the many commitment decisions that *don’t*.¹⁸⁷ In short, the EU Courts haven’t always honed the norms of competition law towards the rule of law ideal.

Wardhaugh’s negative appraisal of the judicial record on these issues may underpin his marginalisation of the courts for achieving legal certainty. But disjuncture between theoretical potential and practical reality does not necessarily mean that the former shouldn’t be an aspiration. Wardhaugh is right to highlight that US courts have contributed to uncertainty through expanding the effects-based ‘rule of reason’ standard for determining legality (Chapter 2). As with the CJEU this is unfortunate, warning that we cannot assume courts will always grasp opportunities to transform individualised, subject-specific determinations of legality into clearer, generalised obligations. But this was not inevitable. Nor is it unsolvable. Seemingly all-encompassing standards can still meet the formal rule of ideal through precedents that gradually clarify and rigidify the division between legal and illegal, whether through introducing presumptions or multi-stage tests.¹⁸⁸ Furthermore, Wardhaugh’s almost absolutist stance on *stare decisis* (164–165, 192–203, 213–214) and suggestion that legal change must occur through democratically-endorsed legislation (152–153, 161–166, 171–172) are both unhelpful for redeeming the formal rule of law in competition circles. Insisting upon legal stability and reducing opportunities for reactive evolution makes the rule of law ideal seem static, dogmatic, and unfeasible in a field constantly challenged by developments in economics, technology, and business practices.

In summary, the courts are of instrumental significance for making realisation of the political and economic virtues of the formal rule of law more achievable. As caretakers of a dynamic normative order, courts reactively refine legal obligations through adjudicating disputes arising from normative uncertainty and reviewing administrative decision-making. These are opportunities for courts to clarify the incomprehensible and generalise from the specific. Whether judges in competition matters actually fulfil this role is, however, questionable.

185 For example contrast how the legal test from *Magill* was applied in *Microsoft*: C-241–242/91P *RTE & ITP v Commission* ECLI:EU:C:1995:98; T-201/04 *Microsoft v Commission* ECLI:EU:T:2007:289.

186 For example C-441/07P *Commission v Alrosa* ECLI:EU:C:2010:377; T-76/12 *Morningstar Inc v Commission* EU:T:2016:481.

187 Stones, n 176 above, 388–399.

188 P. Schlag, ‘Rules and Standards’ (1985) 33 *UCLA Law Review* 379, 428–429; L. Kaplow, ‘Rules versus Standards: An Economic Analysis’ (1992) 42 *Duke LJ* 557, 611.

CONCLUSION

Bruce Wardhaugh's *Competition, Effects and Predictability* is an important contribution to debates on the appropriate legal form of competition enforcement. It is the first monograph-length analysis of the formal rule of law in competition law and is impressive in its breadth.

There are however problems: questioning rationality, key to the significance of legal certainty; omitting normative generality, a perennial feature of formal conceptualisations of the ideal; and a dismissive approach to courts, which are critical for rendering the formal rule of law a dynamic, realistic, and more achievable aspiration.

But for a supporter of Wardhaugh's overall argument, the most troubling aspect of *Competition, Effects and Predictability* is the absence of a compelling justification for realising the formal rule of law in this field, capable of animating the growing movement against *ad hoc*, subject-specific determinations of legality. The main purpose of this article has been to fill the justificatory void by arguing why competition lawyers should care about the formal rule of law. As summarised in Table 1, centuries of political and economic scholarship settle upon similar conclusions: comprehensible rights and obligations permit the meaningful exercise of individual freedom and stabilise markets to facilitate more efficient reactions to the price mechanism; generalised norms of equal application rigidify determinations of legality to facilitate freedom, prevent discrimination against individuals, and forestall market-distorting privileges at the behest of private interests; and the courts provide adjudication, enforcement, and a fall-back process for gradually approximating these aspirational ideals through reviewing administrative determinations of legality.

Without a compelling justification, appeals to the formal rule of law can be brusquely dismissed as legalistic and ethereal, inappropriate in the context of market interventions pursuing economic goods. But when rejecting the desirability of comprehensible and generalised competition law, which of the desiderata in Table 1 are critics happiest to marginalise: freedom, responsibility, effective economic decision-making? Are they content with discrimination against particular businesses?

As Wardhaugh and the 'Neo'-Chicagoans argue, economic wisdom can be incorporated *ex ante* into the construction of presumptions and multi-stage legal tests, rather than simply settling for the application of *ex post*, effects-based standards. Of course, designing legal tests that aspire towards economically accurate outcomes and realisation of the formal rule of law requires solving some difficult trade-offs. But with an account of its political and economic significance, of why competition lawyers should care, the formal rule of law is less likely to be brushed aside.

Table 1. the significance of the formal rule of law for competition law

I: Comprehensible Laws	II: Generalised Laws of Equal Application	III: Judicial Review and Adjudication
<p>–Political significance: meaningful exercise of freedom, ability to rationally plan, attribution of responsibility for illegality.</p> <p>–Economic significance: more effective institutions which facilitate market decision-making and mitigate informational uncertainty.</p>	<p>–Political significance: additional restraint on centralised coercion, freedom to pursue own ends, discrimination hindered.</p> <p>–Economic significance: prevents privately motivated, individualised interferences with market outcomes.</p>	<p>–Enforce congruence between law and reality.</p> <p>–Residual mechanism for reactively refining: unclear norms or individualised/incomprehensible administrative decisions into generalised and comprehensible laws.</p>